

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RUBY G.

Claimant,

vs.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2011100217

DECISION

Administrative Law Judge Robert Walker, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California, on December 1, 2011.

Jennifer Cummings, Program Manager for Fair Hearings and Legal Affairs, Inland Regional Center, represented the service agency, Inland Regional Center.

Mercy G., claimant's mother, represented the claimant, Ruby G.

The matter was submitted on December 1, 2011.

SUMMARY

Regional center provides claimant with Applied Behavioral Analysis (ABA) services. Regional Center sent a notice of proposed action proposing a reduction in the number of ABA hours from 52 to 48. The notice was defective in that it did not provide the required 30-day advance notice. The regional center, in an effort to correct the defect, authorized compensatory services. Further, the notice implied that there is a question as to the number of hours to be provided after the end of a six-month period.

Claimant appealed. Claimant contends the regional center cannot reduce the hours because the notice of proposed action was defective. Claimant also contends that, in any event, she is entitled to 52 hours of ABA services.

In this decision, it is found and determined as follows: The defect in the notice of proposed action was not the sort of defect that would deprive the regional center of a right to proceed; the regional center can rely on the notice of proposed action. Claimant is not entitled to have the hours continue without reduction; the regional center may reduce the hours from 52 to 48. The regional center, however, must provide compensatory hours to compensate for any failure to provide aid paid pending.¹

To the extent the notice of proposed action implies that there is some uncertainty as to the number of hours to be provided after the end of a six-month period, the notice is set aside.

FACTUAL FINDINGS

1. Claimant, Ruby G., is a regional center consumer. She is 11 years old and has been diagnosed with autistic disorder. Claimant lives at home with her father, mother, and two older sisters.

2. The regional center provides claimant with in-home ABA services and 24 hours of respite care per month.

Dr. Jebelli's Testimony Regarding ABA

3. Azadeh Jebelli, Ph.D., B.C.B.A., is an autism clinical specialist with the regional center. Dr. Jebelli holds a doctor's degree in neuroscience and is board certified as a behavioral analyst by the Board of Behavioral Analysts, a national board.

4. The following is a paraphrased summary of part of Dr. Jebelli's testimony.

5. ABA is an evidence-based treatment for autistic disorder. In fact, it is the only evidence-based treatment for autistic disorder.

6. ABA services include direct intervention, supervision, and team meetings. Direct intervention is one-on-one work a therapist does with an autistic child. Supervision is the work a therapist does in training a child's parents to support the child's program. Team

¹ When a regional center proposes a reduction in a consumer's services and the consumer files a timely appeal, the regional center generally may not reduce the service until the appeal is resolved. The "aid" that is paid by the regional center pending the resolution of the appeal is referred to as *aid paid pending*.

meetings involve a supervisor's working with a therapist and a child's parents to develop and modify the child's program.

7. ABA services are intended to improve a child's socially acceptable behavior, reduce maladaptive behaviors, and teach skills. One tenet of ABA training is that children with autistic disorder learn best when tasks are broken down into simple elements and the child is repeatedly and consistently prompted and encouraged to perform those simple elements. Once a child masters the elements, he or she can put them together and learn to accomplish the task. Because it is essential that prompts and encouragement be consistent, it is not enough for the therapist to learn and follow a child's program. A therapist spends only a few hours a day with a child. Most parents spend more time with a child than a therapist does, so it is important that parents learn and follow the program.

8. A second reason that training parents is important has to do with the fact that children with autistic disorder tend not to generalize information. For example, if an autistic child learns that the color of a block is *blue*, he or she is not likely to generalize that learning and apply it to other things. That is, he or she is not likely to understand that other blue things are blue. It is important that parents learn the principles and techniques of ABA and use them to help a child compensate for this inability to generalize things the child has learned.

9. ABA is not a service to be provided throughout a child's life. One should not allow a child to become dependent on prompts. The goal is for a child to acquire skills and learn to improve his or her behavior independently – without prompts. A second concern has to do with limits on the effectiveness of ABA. After a while, progress tends to plateau, and ABA has little effect. Thus, when a child makes progress and the parents learn the principles and techniques of ABA, therapy hours should be reduced.

Claimant's Services and the Proposed Reduction

10. Claimant's ABA services are provided through Assessment, Consultation, Counseling, and Educational Support Services (ACCESS). The services include 52 hours per month of direct intervention, six hours per month of supervision, and four hours per month of team meetings. Claimant also receives ABA services at school, but this appeal does not concern those services.

11. Kathleen Kitlowski, Ph.D., B.C.B.A., is an autism consultant with ACCESS. In a quarterly report of July 29, 2011, Dr. Kitlowski reviewed claimant's progress and recommended as follows:

It is recommended that [Ruby's hours] be reduced to 50 hours per month for behavior tutoring with 6 hours per month for supervision and 4 hours per month . . . for team meetings . . . from 9/1/11 to 11/30/11 and to 48 hours per month from 12/1/11

to 2/28/11² with 6 hours per month for supervision and 8³ hours per month for team meetings.

12. The regional center adopted Dr. Kitlowski's recommendation and sent claimant's parents a notice of proposed action dated September 29, 2011. The notice of proposed action quoted Dr. Kitlowski's recommendation and advised claimant's parents that the recommendation⁴ would be implemented but with a start date of October 1, 2011. Claimant appealed, and her appeal is the subject of the present proceeding.

13. Based on the evidence presented, it is found that the regional center did not intend to increase the team meeting hours from four to eight. It is found that the only proposed change was to reduce the direct intervention hours from 52 to 48.

14. Dr. Jebelli testified that she supports Dr. Kitlowski's recommendation. Dr. Jebelli said claimant has made wonderful progress and that her mother has made wonderful progress in learning the principles and techniques of ABA.

15. Claimant's mother disagrees. The following is a paraphrased summary of part of claimant's mother's testimony. Ruby has met only a few of her goals – three out of 19. Grooming continues to be difficult for her. The goals set for the parents are overwhelming. The therapist does a better job than the parents do. When I try to prompt and encourage Ruby, she is not willing to learn. I have two older daughters, but because Ruby is autistic, I have no idea of how to deal with her at her age. I fear that a reduction in hours will cause her to regress – perhaps interfere with her learning to interact socially.

16. Claimant's mother pointed to a March 22, 2010, psychological evaluation update by Robin L. Morris, Psy. D., in which Dr. Morris recommended that the 12 hours per week of 1:1 services be continued.⁵

² This obviously is a typographical error. It should read *from 12/1/11 to 2/28/12*. (In fact, because 2012 is a leap year, Dr. Kitlowski probably intended it to read *to 2/29/12*.)

³ This appears to be a typographical error. Claimant's time for team meetings is four hours per month. There was no evidence that those hours need to be increased and, except for what appears to be multiple errors, no evidence that the regional center intended to increase them.

⁴ The notice of proposed action continues Dr. Kitlowski's error concerning the year. In the regional center's determination, apparently in recognition that 2012 is a leap year, the regional center changed the 2/28/11 to 2/29/11. The notice of proposed action also continues the apparent error concerning eight hours of team meeting time.

⁵ Twelve hours per week is 52 hours per month. Twelve hours times 52 weeks equals 624 hours per year. And 624 hours divided by 12 months equals 52 hours per month.

17. Dr. Kitlowski testified that reducing the hours slightly will not affect claimant's progress. Dr. Kitlowski said one goal is to help claimant learn to function more independently.

Finding that Claimant is not Entitled to Have the Hours Continue at the Present Level

18. Based on Dr. Kitlowski's recommendation and Dr. Jebelli's testimony, it is found that claimant's hours should be reduced from 52 to 48.

The Notice of Proposed Action was Defective with Regard to the Period of Notice

19. A notice of intent to reduce services must be sent by certified mail at least 30 days prior to the date of the proposed reduction. As noted above, the notice to claimant's parents was dated September 29, 2011, and notified them that the hours would be reduced beginning on October 1, 2011. Thus, the notice in this case provided two days notice rather than the required 30 days.

20. When the regional center realized the notice was defective, the regional center authorized compensatory hours to compensate for any hours lost because of the defect. Because of claimant's being ill and because of scheduling problems, certain compensatory hours have not been provided. Dr. Kitlowski testified that hours that are authorized for one month are lost if not provided in that month. That is, the regional center does not permit ACCESS to bank a consumer's hours and provide services that were scheduled to be provided in a prior month. Thus, certain compensatory hours have not been provided.

Modification of the Timing of the Reductions

21. Because of the appeal, the timing of the reductions must be modified. If the original dates of proposed reduction were retained, claimant's hours immediately would be reduced from 52 to 48. An immediate reduction of four hours is not what was recommended and not what the notice of action proposed. Dr. Kitlowski recommended a stepped reduction. She recommended a reduction from 52 hours to 50 hours and, after three months, a further reduction to 48 hours. The regional center's proposal adopted that recommendation. One would assume there are therapeutic reasons for stepping the reduction.

22. It is found that, beginning with the effective date of this decision, the regional center may reduce the number of direct intervention hours to 50 hours per month; and three months later, the regional center may reduce the number of direct intervention hours to 48 hours per month.

The Implication that there is Some Uncertainty as to the Number of Hours to be Provided After the End of a Six-Month Period

23. The notice of propose action advised, in part, that from December 1, 2011, through February 29, 2012,⁶ “Ruby will receive . . . 48 hours per month of 1:1.”

24. What was to happen after February 29, 2012? Was there no longer to be an authorization for ABA? Would the authorization continue but without a particular number of hours being authorized?

25. No evidence supported a discontinuation of ABA services and no evidence supported a further reduction of hours after the reduction to 48.

26. To the extent the notice of proposed action implies that there is some uncertainty about the number of hours to be provided after six months, the notice is set aside. If the regional center proposes further reductions, it must comply with statutory requirements.

LEGAL CONCLUSIONS

Claimant is not Entitled to Have the Hours Continue at the Present Level

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act), beginning at section 4500 of the Welfare and Institutions Code,⁷ governs the rights of regional center consumers.

2. The State of California accepts responsibility to provide services to persons with developmental disabilities. (§ 4500, et seq.) The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) Regional centers are charged with the responsibility of carrying out the state’s responsibilities to the developmentally disabled under the Lanterman Act. (§ 4620, subd. (a).) The Lanterman Act directs regional centers to develop and implement an Individual Program Plan (IPP) for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer’s goals and objectives and delineates the services and supports needed by the consumer. (§§ 4646, 4646.5, & 4648.)

3. In *Williams v. Macomber*⁸ the court of appeal addressed the Lanterman Act and said:

⁶ As noted, it mistakenly said February 29, 2011.

⁷ All statutory references are to the Welfare and Institutions Code unless otherwise specified.

⁸ *Williams v. Macomber* (1990) 226 Cal.App.3d 225.

“In order for the state to carry out many of its responsibilities as established in this division,” the Act directs the State Department of Developmental Services to contract with “appropriate private nonprofit corporations for the establishment of a “network of regional centers.” (§§ 4620, 4621.) Regional centers are authorized to “[p]urchase . . . needed services . . . which the regional center determines will best” satisfy the client’s needs. (§ 4648.) The Act declares: “It is the intent of the Legislature to encourage regional centers to find innovative and economical methods” of serving their clients. (§ 4651.) The Act directs that: “A regional center shall investigate every appropriate and economically feasible alternative for care of a developmentally disabled person available within the region.” (§ 4652.)

[¶] . . . [¶]

The Lanterman Act “grants the developmentally disabled person the right to be provided at state expense with only such services as are consistent with its purpose.” (*Association for Retarded Citizens v. Department of Developmental Services* (1985) *supra*, 38 Cal.3d 384, 393.) As noted previously, a primary purpose of the Act is to “minimize the institutionalization of developmentally disabled persons and their dislocation from family.”⁹

4. The Lanterman Act also requires regional centers to be cost conscious.

[I]t is the . . . intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and *reflect the cost-effective use of public resources.*¹⁰ (Italics added.)

5. When selecting a provider of consumer services and supports, regional center, the consumer, or where appropriate, his or her parents, legal guardian, conservator, or

⁹ *Id.* at pp. 232-233.

¹⁰ Welfare and Institutions Code at § 4646, subd. (a).

authorized representative shall consider, “the cost of providing services or supports of comparable quality by different providers, if available.”¹¹

6. The Lanterman Act requires regional centers to do a number of things to conserve state resources. For example, it requires regional centers to “recognize and build on . . . existing community resources.”¹²

7. With certain exceptions, the Lanterman Act requires regional centers to:

Identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following: (1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program. (2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.¹³

8. The Lanterman Act prohibits the use of regional center funds to pay for services another agency is obligated to provide. The act states:

Regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.¹⁴

9. None of these provisions concerning cost-effectiveness detracts from the fact that eligible consumers are entitled to the services and supports provided for in the Lanterman Act. These provisions concerning cost-effectiveness do teach us, however, that cost-effectiveness is an appropriate concern in choosing how services and supports will be provided.

10. By reason of the matters set forth in Findings 3 through 14, 17, and 18, it is determined that it is appropriate to reduce claimant’s direct intervention hours to 50 hours

¹¹ *Id.* at § 4648, subd. (a)(6)(D).

¹² *Id.* at § 4685, subd. (b)(3).

¹³ *Id.* at § 4659, subd. (a).

¹⁴ *Id.* at § 4648, subd. (a)(8).

per month for three months and to 48 hours per month after that. Dr. Kitlowski's recommendation and Dr. Jebelli's testimony support a conclusion that it is appropriate to reduce the hours. Dr. Morris's recommendation that the hours be continued at the present level was made in March of 2010 and is not current. Dr. Kitlowski's recommendation and Dr. Jebelli's testimony are based on claimant's progress and present level of accomplishments.

The Defect in Notice is not Such as to Deprive the Regional Center of a Right to Proceed, but Claimant has a Right to Compensation for any Failure to Provide Aid Paid Pending

11. If a regional center proposes to reduce a service it is providing pursuant to a consumer's IPP and if the consumer does not consent to the reduction, the regional center may not reduce the service without complying with a number of procedures designed to protect the consumer's rights. The regional center must serve the consumer with a notice of the proposed reduction. Welfare and Institutions Code section 4710, subdivision (a)(1), provides, in part:

Adequate notice shall be sent to the . . . [service] recipient . . . by certified mail at least 30 days prior to any of the following actions: (1) The agency makes a decision without the mutual consent of the service recipient . . . to reduce . . . services set forth in an individual program plan.

12. The Lanterman Act defines "adequate notice" as a "written notice." Merely talking with a consumer about a proposed reduction does not satisfy the statutory requirement. The definition specifies numerous matters that must be included in the writing. It must include a statement of the action proposed, the reason, the effective date, information about how to appeal, and information about advocacy assistance. And the notice must include information about how the consumer can obtain *aid paid pending*, i.e., how the consumer can continue to receive the existing level of services until after a fair hearing is held. Welfare and Institutions Code section 4701 provides, in part:

"Adequate notice" means a written notice informing the . . . recipient . . . of at least all of the following:

- (a) The action that the service agency proposes to take, including a statement of the basic facts upon which the service agency is relying.
- (b) The reason or reasons for that action.
- (c) The effective date of that action.
- (d) The specific law, regulation, or policy supporting the action.

(e) The responsible state agency with whom a state appeal may be filed, including the address of the state agency director.

(f) That if a fair hearing is requested, the claimant has the following rights:

(1) The opportunity to be present in all proceedings and to present written and oral evidence.

(2) The opportunity to confront and cross-examine witnesses.

(3) The right to appear in person with counsel or other representatives of his or her own choosing.

(4) The right to access to records pursuant to Article 5 (commencing with Section 4725).

(5) The right to an interpreter.

(g) Information on availability of advocacy assistance, including referral to the developmental center or regional center clients' rights advocate, area board, publicly funded legal services corporations, and other publicly or privately funded advocacy organizations, including the protection and advocacy system required under federal Public Law 95-602, the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C.A. Sec. 6000 et seq.).

(h) The fair hearing procedure, including deadlines, access to service agency records under Article 5 (commencing with Section 4725), the opportunity to request an informal meeting to resolve the issue or issues, and the opportunity to request mediation which shall be voluntary for both the claimant and the service agency.

[¶] . . . [¶]

(n) That if a request for a fair hearing by a recipient is postmarked or received by a service agency no later than 10 days after receipt of the notice of the proposed action mailed pursuant to subdivision (a) of Section 4710, *current services shall continue as provided in Section 4715*. The notice shall be in clear, nontechnical language in English. If the claimant or authorized representative does not comprehend English, the

notice shall be provided in such other language as the claimant or authorized representative comprehends. (Italics added.)

13. This is not a case in which the defect in notice caused the claimant to lose a right to aid paid pending. It is not a case in which the regional center failed to advise the claimant of the action that was proposed, the reason for the action, the effective date, the law on which the regional center was relying, the rights the claimant has in connection with a fair hearing, or information on the availability of advocacy assistance. In this case, the regional center provided all of those things. The only defect here was that the period of notice was too short. Thus, this is not a case in which the defect in notice deprives the regional center of a right to proceed. In this case, so long as claimant's right to aid paid pending is preserved, the regional center may proceed.

14. Thus, claimant had a right to have the 52 hours per month of direct intervention services continue to the time a decision is rendered on her appeal. The regional center shall calculate the difference between 52 hours per month and the number of hours claimant has received since October 1, 2011. The regional center shall provide that number of hours to claimant as compensation for the defective notice of proposed action and the failure to provide aid paid pending.

ORDER

1. The regional center may reduce claimant's ABA hours of direct intervention From 52 to 50. Three months after that reduction is made, the regional center may further reduce claimant's hours of direct intervention to 48.

2. The regional center shall compensate claimant for depriving her of aid paid pending. The regional center shall calculate the number of hours it failed to provide from October 1, 2011, to the date of this decision and shall bank that number of hours and allow claimant to draw down on them over the next three months if she feels she needs extra assistance. These compensatory hours shall not be used to reduce the hours to which claimant otherwise is entitled.

3. To the extent the notice of proposed action implies that there is some uncertainty as to the number of hours to be provided after the end of a six-month period, the notice is set aside.

DATED:

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

Notice:

This is the final administrative decision in this matter. Each party is bound by this decision. If a party chooses to appeal, an appeal from this decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf.& Inst. Code, § 4712.5, subd. (a).)